In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1941.

No. 124

HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122; PHIL L. VALLEY, JOHN ALEXANDER and JACK HEISDORF, each individually, as business agent, organizer and vice-president, respectively, for and as representatives of all the members of Hotel & Restaurant Employees' International Alliance, Local No. 122;

INTERNATIONAL LAUNDRY WORKERS, LOCAL No. 174;

BARTENDERS INTERNATIONAL LEAGUE OF AMERICA, LOCAL No. 64, sometimes known as International Bartenders & Beverage Dispensers, Local No. 64;

INTERNATIONAL UNION OPERATING ENGINEERS, LOCAL No. 311;

MILWAUKEE BUILDING TRADES COUNCIL;

All affiliated with the American Federation of Labor,

Petitioners and Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD; HENRY C. FULDNER, individually and as Chairman of, L. E. GOODING, individually and as a member of, R. FLOYD GREEN, individually and as a member of the Wisconsin Employment Relations Board;

PLANKINTON HOUSE COMPANY, a corporation,

Respondents and Appellees.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent.

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Plankinton House Company,
Respondent.

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HOTEL & RESTAURANT EMPLOYEES' INTERNATIONAL ALLIANCE, LOCAL No. 122, et al.,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, PLANKINTON HOUSE COMPANY, et al.,

Respondents.

BRIEF OF PLANKINTON HOUSE COMPANY, Respondent.

NATURE OF ACTION

This proceeding comes before the Court upon a Writ of Certiorari granted to review an original decision of the Wisconsin Supreme Court (*236 Wis. 329, 294 N. W. 632*) rendered November 8, 1940, and confirmed on January 7, 1941, when a motion for rehearing was denied. The State Supreme Court affirmed the judgment of the Circuit Court of Milwaukee County, Wisconsin, which sustained, and enforced an order made by the Wisconsin Employment Relations Board on February 15, 1940. Pro-

ceedings before the Board were instituted by filing of the complaint of Plankinton House Company charging the Petitioners with violence, mass picketing and other unfair labor practices under the Wisconsin Employment Peace Act (Chapter 111, Wis. Stats. 1939). A full and complete hearing was had before said Board, which filed its Findings of Fact and Conclusions of Law determining that the Petitioners were guilty of violence and other unfair labor practices and issued its order directing, inter alia, that the Petitioners immediately cease and desist from:

(a) Engaging in, promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force, or coercion of any kind, the pursuit of lawful work by employees of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

STATEMENT OF JURISDICTIONAL GROUNDS

Petitioners claim that the case involves a justiciable controversy under Sec. 237 (b) of the Act of Congress dated February 13, 1935 (28 U. S. C. A. 344 (b)). The position of the respondent, Plankinton House Company on the question of jurisdiction is fully set forth in the "Statement on Jurisdiction" appearing in its brief in opposition to the petition for the Writ of Certiorari.

The only additional observation it makes is that the very two federal questions now sought to be interposed by the Petitioners as the basis for this Court's jurisdiction (p. 4 Petitioners' Brief) namely, (a) "Whether a requirement that the majority of employees in a bargaining

unit must authorize a strike before peaceful picketing and boycotting pursuant thereto can be permitted" and (b) "Whether the order and the enforcing judgment prohibiting picketing and boycotting" violated the Fourteenth Amendment, were held not to exist factually in the case at bar and were expressly excluded from the opinion of the Wisconsin Supreme Court which stated (S. R. 70-71)[1]:

> "Under the statute and the order of the board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in.
>
> "We did not attempt because it was not involved in this case to distinguish between what a majority group may do in carrying on a strike from what the minority group may do. We pointed out that the statute nowhere prohibited employees from withdrawing from their employment either singly or in groups and certainly it in no way interferes with the right of free speech. (Par. (e)) as construed does not prohibit, as described in the Thornhill case, peaceful picketing."

ISSUES INVOLVED

1. Does *Sec. 111.06 (2) (e) Wis. Stats.* as construed by the Wisconsin Supreme Court evidence a careful balancing of public and private interests by the State Legislature and is it narrowly drawn and specifically aimed at serious encroachments upon those interests so as to be a valid exercise of the State's police powers reserved in the Tenth Amendment, or, does such statute, so construed, regulate unreasonably the effective exercise of the constitutional

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[1] "S. R." refers to the Supplemental Record or Vol. II of the Transcript of the Record printed by the Clerk of this court, whereas "R." refers to the Record used in the Wisconsin Supreme Court and contained in Vol. I of the Transcript of Record herein.

rights of free speech and equal protection of the law guaranteed by the Fourteenth Amendment?

2. Do the order of the Wisconsin Employment Relations Board and the judgment of the State courts sustaining and enforcing such order result in an unconstitutional application of the above statute to the facts in the case at bar?

CORRECTED STATEMENT OF FACTS[1]

The Court's attention is called to these salient matters of record not appearing in the Petitioners' brief:

(1) The Labor Contract (Exh. 1, R. 83) which the Petitioners had with the Plankinton House Company prior to the calling of the strike on November 2, 1939, was admitted by the Unions to be the finest hotel labor contract existing in the United States — the wages paid were as high as, if not higher than, those paid in any other city of the country (R. 225-226). It was the boasted work of art of the Unions' attorneys (R. 173, Exh. 19, pp. 12-13).

(2) The peaceful negotiations between the parties to settle their differences were abruptly terminated by the Unions' attorneys demanding arbitration and threatening to send through the mails to prospective hotel guests a letter denouncing the Plankinton House Company for assuming an anti-labor attitude, urging the cancellation of hotel reservations by guests and foretelling that there

[1] The true Record of Facts, showing numerous acts of violence and continuing manifestations of force, fear and unfair advertising on the part of the petitioning unions, their officers and members, is set forth on pp. 6 to 26, inclusive, of the writer's Brief on behalf of the Plankinton House Company in Opposition to the Petition for Writ of Certiorari and is not repeated here but is incorporated by way of reference for the sake of brevity.

would be union picketing at a strikebound hotel resulting in crippled and curtailed services (Exh. 7, R. 83-84).

(3) The Labor Contract (Exh. 1, R. 83) between the parties provided in Par. 4 of Article I thereof:

> "If the parties cannot reach an agreement through negotiation on or before thirty days after the termination of the preceding contract year, the differences shall be submitted to arbitration in the manner and form hereinafter set forth."

and Article III of said Labor Contract providing for arbitration stated:

> "The arbitration award shall be final and binding upon both parties. There shall be no strike or lockout during the life of this contract, provided, however, in the event both parties elect to continue the contract but negotiate changes, if there is no agreement resulting from such negotiation within thirty days after the termination of the preceding contract year and the same is then submitted to arbitration and either party is dissatisfied with the result of the arbitration, then the right to strike or lockout shall be had by the respective parties. * * *"

(4) The arbitration award (Exhibit 9, R. 84) was rendered on October 31, 1939, and granted all the demands of the Unions except that *if the Union desired an all-union contract*, a three-fourths vote of the employees in each proper collective bargaining unit should first be obtained by secret ballot in a referendum conducted by the Wisconsin Employment Relations Board as required by Sec. 111.06 (c) of the Wisconsin Employment Peace Act.

(5) On November 1, 1939, the employer gave written notice of his acceptance of this arbitration award (Exhibit 10, R. 84, 256) and the Unions' attorneys acknowl-

edged receipt thereof on November 2, 1939 (Exhibit 11, R. 84).

(6) On the very same day (November 2, 1939) at about 4:00 p. m. the Unions' Business Agent, Phil L. Valley, called a general strike at the Plankinton House Company, ordered all employees in every department of the hotels (Plankinton House Hotel and the Kilbourn Hotel) to cease work and threw a picket line of 75 to 80 men about all the entrances of the hotels (Board's Finding No. 14, R. 84, 85, 256). At the time the strike was called the hotels were filled to capacity with school teachers who were in Milwaukee for the State Teachers Convention (R. 153-158).

(7) Prior to calling of the strike the Unions did not vote by secret ballot to call such strike as required by Sec. 111 (2) (e) Wis. Stats. and this fact was expressly so stipulated (R. 82).

(8) The Board found that all contractual relationships existing between the parties were terminated by the Unions on November 2, 1939, by the refusal of the Unions to accept the award of arbitration and the act of calling a strike (Board's Conclusions of Law No. 1 and No. 2, R. 259, 260);

(9) Out of 188 employees, 148 had returned to work on December 1, 1939, at the time of the hearing before the Board so that the hotels continued to operate but it was necessary for the City of Milwaukee to post six policemen about the hotels throughout the time of the strike and for twenty-four hours each day for the purpose of maintaining order — at times additional police officers were necessary to permit deliveries to and from the hotels, and protect persons and property (R. 158, 197, 257, S. R. 32).

(10) The true record of physical violence, mass picketing, secondary boycott and other unfair labor practices generating fear and intimidation is set forth in the brief of the Plankinton House Company in opposition to the Petition for Writ of Certiorari and, for the sake of brevity, is incorporated herein by reference; the aforesaid coercive activities of the Unions, their officers and members were not "fugitive encounters" or "occasional excesses" in moments of "animal exuberance" as alleged (pp. 6, 43-50 of Petitioners' Brief), but were studied and concerted manifestations of force, fear, and other unfair labor practices, committed by high ranking officers of the Union, picket captains and supervisors of the picket line, not once, but several times, in respect to which the Unions provided bail, legal counsel and even paid the criminal fines upon conviction (R. 257-258).

ARGUMENT

Summary of Argument

I. *Sec. 111.06 (2) (c) Wis. Stats.* as construed by the Wisconsin Supreme Court evidences a careful balancing of public and private interests by the State Legislature and is narrowly drawn and specifically aimed at serious encroachments upon those interests so as to be a valid exercise of the State's police powers reserved in the Tenth Amendment.

A. The private right to picket, boycott and engage in overt concomitants of a strike is not absolute.

B. The State's power over manifestations of force and coercion in labor matters is well established.

C. Analysis of the Wisconsin Employment Peace Act shows it is a reasonable regulation of the State's police powers.

D. Equal protection of the law is not denied by the Majority-Minority classification of *Sec. 111.06 (2) (e) Wis. Stats.* for it is an accepted reasonable form of legislative classification in labor matters.

E. The qualified right of free speech is neither involved nor invaded.

II. The order of the Board and the enforcing judgment of the State Court constitutionally apply the Wisconsin Employment Peace Act to the proven facts in the case.

A. The record shows violent means were adopted for unlawful purposes and continued fear and intimidation exist.

B. The record shows the Unions authorized, participated in and ratified the acts of violence and other unfair labor practices.

C. The order of the Board enforced by the judgment of the State Court is not too broad and comprehensive.

I.

Sec. 111.06 (2) (e) Wis. Stats. As Construed by the Wisconsin Supreme Court Evidences a Careful Balancing of Public and Private Interests by the State Legislature and Is Narrowly Drawn and Specifically Aimed at Serious Encroachments Upon Those Interests So as to Be a Valid Exercise of the State's Police Powers Reserved in the Tenth Amendment.

A. The Private Right to Picket, Boycott and Engage in Overt Concomitants of a Strike.

The first jural postulate in the science of jurisprudence is that in a civilized society men must be able to assume that others will commit no intentional aggressions upon them and the corollary thereto is that one who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or a public interest in securing (*Roscoe Pound, Outlines of Jurisprudence,* pp. 107, 117, 118). This principle has been incorporated in the *Restatement of the Law on Torts* (Vol. 4, pp. 94, 95, 141) wherein it is stated:

> "Concerted action by workers to enforce the requests of workers necessarily involves pressure on the employer which may cause him financial loss or at least interfere with his freedom to operate his business as he likes, and such concerted action necessarily involves the infliction of intentional harm. This was regarded as subjecting the workers to liability unless their conduct was justified; this theory has prevailed. The development of the law in succeeding years has related to the issue of justification."

The law is further splendidly summarized by the American Law Institute in Volume 4 of *Restatement of the Law on Torts* where it is stated (Sec. 775, 794, 796):

> "Workers are privileged intentionally to cause harm to another by concerted action if the object and the means of their concerted action are proper; they are subject to liability to the other for harm so caused if either the object or the means of their concerted action is improper.
>
> * * *

"An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers.

* * *

"When workers engage in concerted action against an employer for more than one object and one or more of the objects are improper, their action is not for a proper object so long as they insist on the improper objects."

The great liberal, Justice Brandeis, stated in *Dorchy v. State of Kansas* (1926), 272 U. S. 306, 47 Sup. Ct. 86, 71 L. Ed. 248, that neither the common law nor the Fourteenth Amendment to the United States Constitution confirms the absolute right to strike. Previously this same jurist in a famous dissenting opinion in the case of *Truax, et al., v. Corrigan* (1921), 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254, thoroughly reviewed the history of labor combinations, picketing and boycotting and reached the following conclusions:

1. That the relation of employer and employee affords a constitutional basis for legislation applicable only to persons standing in that relation.

2. That *in the absence of state legislation,* the Courts, by the exercise of a quasi legislative function, determine the public policy as to the instruments that may be lawfully used by the contestants in labor disputes *without involving a breach of the peace or injury to tangible property.* (Italics ours.)

3. That by no great majority the judicial opinion in America declared illegal the boycott as commonly practiced.

4. That by no great majority the prevailing judicial opinion inclined towards the legality of peaceful picketing.

Under the drive of the dilemma that picketing is either pure, undiluted economic coercion or an exercise of the constitutional right of free speech, new channels of thought cut themselves into the labor law and literature of the country. The modern starting point of the legal status of picketing with its alleged "vague contours" is the case of *Thornhill v. Alabama* (1940), 310 U. S. 88, wherein this Court made these pertinent observations (pp. 101, 102):

> 1. "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."
>
> 2. "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."

In *Carlson v. California*, 310 U. S. 106 at 113, this Court stated:

> "For the reason set forth in our opinion in *Thornhill v. Alabama*, supra, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within the liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State."

In *Milk Wagon Drivers Union of Chicago, Local 753, et al., v. Meadowmoor Dairies, Inc.* (1941), 312 U. S. 287 at 293, it was said:

> "Peaceful picketing is the workingman's means of communication. It must never be forgotten, however, that the Bill of Rights was the child of the Enlight-

> enment. Back of the guarantee of free speech lies faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."

Lastly, in *American Federation of Labor v. Swing*, 312 U. S. 321 at 326, this Court held that:

> "The right of free communication cannot, therefore, be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ."

By virtue of the aforesaid recent decisions of this Court, it cannot be denied that peaceful picketing, especially the publicity aspects thereof, have a constitutional basis under the Right of Free Speech and the Right of Free Press, which Rights are, as hereinafter shown, not absolute but qualified and subject to reasonable regulation by the State's police powers.

B. The State's Power Over Manifestations of Force and Coercion in Labor Matters.

That the State of Wisconsin has the right to control all manifestations of force, fraud and fear whether practiced by physical means or otherwise, within its boundaries and to regulate the use of the coercive weapons of industrial strife — the lockout, the strike, picketing, boycotting and other overt concomitants of a strike — by powerful combinations of either capital or labor, acting in concert, is now firmly established by decisions of the highest state and federal courts.

Thus, in the exercise of this police power Wisconsin has declared it criminal to concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatsoever (*Sec. 343.681 Wis. Stats.*) or by threats, intimidation, force or coercion of any kind to hinder any other person from engaging in any lawful work (*Sec. 343.683 Wis. Stats.*). These statutes have been held to be constitutional and to apply particularly to malicious mischief of combinations subject to legislative repression as pointed out by this Honorable Court speaking through Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194.

In addition to the aforesaid criminal enactments, Wisconsin has provided a Labor Code which declares what constitutes lawful conduct in civil matters relating to labor disputes (*Sec. 103.53 Wis. Stats.*). The Code permits peaceful picketing but specifically conditions this conduct upon the absence of intimidation, coercion, fraud, violence, breach of the peace or threat thereof and expressly states that nothing therein shall be construed to legalize a secondary boycott. This Wisconsin Labor Code was held to be constitutional and a valid exercise of the State's police powers in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, where peaceful picketing in Wisconsin was fully defined by Mr. Justice Brandeis, who concluded (p. 481):

> "The laws of Wisconsin as declared by its highest court, permit Unions to endeavor to induce an employer when unionizing his shop to refrain from working in his business with his own hands. * * * Whether it was wise for the State to permit the Unions to do so is a question of public policy — not our concern. The Fourteenth Amendment does not prohibit it."

Again, in the case of *Lauf, et al., v. Shinner & Co., Inc.*, 303 U. S. 323, the aforesaid Wisconsin Labor Code, espe-

cially Sec. 103.53 thereof, was carefully examined and found binding upon the federal courts — particularly the construction and application thereof by the Wisconsin Supreme Court.

The more recent pronouncements of this Honorable Court summarize and crystallize the power of the State in matters of labor relations. Thus, it is stated in *Thornhill v. Alabama,* 310 U. S. 88, at 103, 104, 105:

> "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private ncern."
>
> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. * * *
>
> "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives and the property of its residents cannot be doubted."

In *Carlson v. California,* the identical language used in the last quotations from the *Thornhill case,* supra, was repeated.

In *A. F. of L. v. Swing,* 312 U. S. 321 at 325, we find this significant passage:

> "That a State has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic."

After admonishing judges not to be so innocent of the actualities of industrial conflict and recognizing that the judiciary has no power to formulate state policy or pass

upon the wisdom of a State Labor Code, this court observed in the recent *Meadowmoor Dairies case*, 312 U. S. 287 at 295:

> "The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. And in exercising its power a state is not to be treated as though the technicalities of the laws of agency were written into the Constitution. * * *
>
> "It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the *power of the states to prevent future coercion. * * * We are here concerned with power and not with the wisdom of its exercise.*" (Italics ours)

If the State of Wisconsin has the power to enact valid criminal and civil laws relating to labor relations as shown above, then it must also have the power to enact the Wisconsin Employment Peace Act to provide against unfair labor practices of employers, employees or strangers, thereby preserving for all employees — whether affiliated with organized labor or not — the right of self-organization and collective bargaining through representatives of their own choosing free from coercion from any source — including powerful trade unions. If the State of Wisconsin had the power to enact the 1935 Labor Code which was held constitutional by this Court in *Senn v. Tile Layers Protective Union*, 301 U. S. 468, and *Lauf, et al., v. Shinner & Co., Inc.*, 303 U. S. 323, then it also had the power to repeal its Labor Code and change its public policy in respect to labor relations by enacting the Wisconsin Employment Peace Act. Furthermore, the State of Wisconsin must also have the power to prevent the defeat of its new labor policy seeking *unity, security and prosperity* in the State through industrial peace, regular and adequate income for employees and uninter-

rupted production of goods and services. To deny the State appropriate means to attain the objects of its power is in effect to deny the existence of its power. Thus, in *Cantwell, et al., v. Connecticut,* 310 U. S. 296, 307, 308, this Court stated that the declaration of a state's policy as distinguished from a mere Common Law concept would "weigh heavily in any challenge of the law as infringing constitutional limitations," and that:

> "No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, *or other immediate threat to public safety, peace, or order appears, the power of the state to prevent or punish is obvious.*" (Italics ours.)

When the question of national unity and security was at stake and conflicted with an individual's constitutional right of religious freedom, this Court did not hesitate to vindicate the paramount right of the nation to insure unity and security through internal peace and cohesion. It should not hesitate now to declare the similar paramount right of the State of Wisconsin to insure unity and security through industrial peace.

In the case of *Minersville School District, et al., v. Gobitis,* 310 U. S. 586, it was held that the local Board of Education in Pennsylvania and the Legislature of that state could constitutionally require children to take the oath of allegiance to the flag and give the salute without infringing upon the due process of law or invading the right of religious freedom and liberty guaranteed by the Fourteenth Amendment for, it was stated (pp. 595 and 600):

> "*National unity is the basis of national security.* To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills. * * * Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. *But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties.*" (Italics ours.)

The very last words written in the opinion of the Court in the *Meadowmoor Dairies, Inc., case,* 312 U. S. 287 at 299, were:

> "Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution."

Only by a strict adherence to this rule of segregation of powers can the independency of the Judiciary itself and the sovereignty of the states be preserved in our democratic form of federal government.

Therefore, it logically follows that the State of Wisconsin, in the exercise of its sovereign police powers, has the undeniable right to control all manifestations of force and coercion whether practiced by physical means *or otherwise* within its borders, regulate the *concerted use of coercive weapons of industrial strife* and for that purpose to enact the Wisconsin Employment Peace Act subject to the express legislative mandate (*Sec. 111.15 Wis. Stats.*) that:

> "Nothing therein shall be construed * * * to invade unlawfully the right to freedom of speech,"

and the judicial mandate of the Wisconsin Supreme Court that in the construction and application of *Sec. 111.06*

(2) (e) Wis. Stats. it must be expressly understood by the enforcing authorities that (S. R. 70, 71):

> "Under the statute and the order of the Board as interpreted and construed by the explicit language of the opinion, freedom of speech and the right peacefully to picket is in no way interfered with * * *. Par. (e), as construed, does not prohibit, as described in the Thornhill case, peaceful picketing."

Whether it was wise for the State of Wisconsin to so restrict the use of coercive instrumentalities of industrial strife by powerful combinations, is a question of public policy. As Mr. Justice Brandeis said, it is "no concern" of the Federal Government, for "the Fourteenth Amendment does not prohibit it," and the judgment of the highest state court as to the construction and application of the State Labor Code is conclusive upon the Federal Judiciary (*Senn. v. Tile Layers Protective Union,* 301 U. S. 468 at 481; *Lauf, et al., v. Shinner & Co., Inc.,* 303 U. S. 323; *Minnesota v. Probate Court,* 309 U. S. 270 at 273).

C. Analysis of the Wisconsin Employment Peace Act.

Aside from the background of coercion created by physical violence and otherwise and the continuity of fear and intimidation generated thereby which were clearly proven by the Record, found by the Board and authenticated by the State Judiciary, it is believed that the Wisconsin Employment Peace Act, especially *Sec. 111.06 (2) (e)* thereof, can be sustained as a valid exercise of the state police powers guaranteed by the Tenth Amendment. This, of course, requires a fair analysis devoid of a fire to pervert as pointed out in the *Meadowmoor Dairies, Inc., case,* 312 U. S. 287 at 298, where this Court said:

> "Nor ought State action be held unconstitutional by interpreting the law of the State as though, to use

a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert."

The same spirit "to save rather than destroy" that pervaded this Court's opinion in sustaining the constitutionality of the National Labor Relations Act, should now prevail in judging the constitutionality of the Wisconsin Employment Peace Act (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 at 30).

In testing, therefore, the constitutionality of *Sec. 111.06 (2) (e) of the Wisconsin Act* "on its face" we must consider the entire Act in order to ascertain the true legislative intent. We must, as indicated in the *Thornhill case,* ascertain whether there has been a careful balancing of the above mentioned private and public constitutional rights and interests — whether the statute has been "narrowly drawn to cover the precise situation giving rise to the danger" — whether it has been aimed specifically at serious encroachments (a clear and present danger of substantive evils) to the lives, liberty and property of the people of the State of Wisconsin. To call the Legislature of Wisconsin "reactionary" and the Wisconsin Employment Peace Act passed in 1939 "an employee slavery act" designed to destroy the workers' right to self-organization, collective bargaining and equalization of employer-employee bargaining powers as Petitioners do in their brief (pp. 18-22) merely "begs the question" and proves nothing but their ability at "name-calling."

The history and the philosophy of the Law of Labor Relations in Wisconsin prove conclusively the grave legal and social problems that confronted the Legislature of Wisconsin when it passed the Wisconsin Employment Peace Act of 1939. National and international affairs were in a most chaotic condition. Production of goods and services by employers and regular employment and adequate income

for employees — all making for state unity, security and prosperity — were interrupted and often destroyed entirely by violent and coercive picketing, boycotting and other overt concomitants of a strike conducted by powerful national and international trade unions. Industrial peace was threatened by these combinations of Labor bent upon gaining jurisdictional power, conducting organizational campaigns and even usurping governmental control over the very lives, liberty and property of the workers of the country. The truth of this observation is made clear when we realize that the worker's job in this economic world is almost tantamount to his life.

The early Wisconsin labor laws were inadequate to cope with this "clear and present danger of substantive evil" resulting from the coercive and often violent activities of labor combinations. Thus *Sec. 133.07 Wis. Stats.* passed in 1919 by the Legislature merely gave the working people of the State of Wisconsin the right to organize into trade unions to advance their social and industrial interests without the danger of legal liability for conspiracy by so doing and severely restricted the issuance of injunctions by the state courts in employer-employee controversies. Under this statute workers were protected in their right to self-organization and collective bargaining from coercion practiced by all persons or groups of persons *except their own or other trade unions.*

Thereafter, in 1931, the Wisconsin Legislature enacted a "Labor Code" (*Ch. 376, Laws of 1931*, known as *Sec. 268.19 to 268.29 Wis. Stats.*, 1931 and 1933, and renumbered in 1935 as *Sec. 103.51 to 103.63 Wis. Stats.*) which defined a labor dispute so as to include not only a controversy between an employer and his employees concerning wages, hours and working conditions, but also a controversy concerning the association or representation of em-

ployees in the exercise of their right of self-organization and collective bargaining between the employer and a person or association "regardless of whether or not the disputants stand in the proximate relation of employer and employee." This definition of a labor dispute became the opening wedge for exploitation of Wisconsin workers by large, powerful combinations of labor. Intensive organizational drives and bitter jurisdictional disputes practically destroyed labor relations between the employer and his employees. Representatives of these combinations of organized labor not only demanded but dictated the terms of employment contracts in Wisconsin.

The Courts of Wisconsin, confronted with the legislative mandates contained in the "Labor Code" were powerless to grant any judicial relief. Thus in *Trustees of Wis. State Federation of Labor v. Simplex* (1934), 215 Wis. 623, 256 N. W. 56, a labor union was held to have obtained a substantive right in respect to collective bargaining under the Wisconsin Labor Code and could enforce that right as a party-plaintiff in a suit in equity for an injunction against an employer who allegedly interfered with his workers' rights to self-organization and collective bargaining. In *American Furniture Co. v. I. B. of T. C.* (1936), 222 Wis. 338, 268 N. W. 250, the State Courts held that under the Labor Code the plant of an employer might be subjected to coercive picketing by a labor union although there was perfect harmony and no labor controversy between the employer and his employees who did not belong or desire to belong to any labor union. Under the same Labor Code it was held that a labor union might conduct coercive picketing operations for the purpose of coercing an employer to desist from performing work with his own hands and in his own business even though all his employees were members of the union and he was in-

eligible to become a member thereof (*Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 875). This last mentioned case was appealed to the United States Supreme Court (*Senn v. Tile Layers Protective Union*, 301 U. S. 468) where the judgment of the Supreme Court of Wisconsin was affirmed in this language, p. 481:

> "The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands * * *. Whether it was wise for the state to permit the unions to do so is a question of its public policy — not our concern. The Fourteenth Amendment does not prohibit it."

On April 15, 1937, a little more than a month before the United States Supreme Court rendered its decision in the *Senn case*, supra, the Wisconsin Legislature enacted a law entitled "The Unfair Labor Practice Act" (Ch. 51, Laws of 1937, later known as Ch. 111 Wis. Stats. 1937). This 1937 Unfair Labor Practice Code was very similar to the National Labor Relations Act in that it was directed against the conduct of employers and not employees. Labor unions and employees could indulge in unfair labor practices with legal impunity whereas the employers' conduct was subjected to the utmost scrutiny.

It became apparent to all fair-minded citizens of the State of Wisconsin that the employer, non-union workers and the public were suffering from the unchecked economic power that was lodged in labor unions and their members. The State Legislature had gone too far in attempting to equalize the employer-employee bargaining power. It was necessary that there be a new careful balancing of the rights and the interests involved in every labor controversy. On May 5, 1939, the State of Wisconsin, therefore, enacted

the Employment Peace Act, Ch. 57, Laws of 1939, *Sec. 111.01 - 111.19 Wis. Stats.*, and sought to reasonably regulate concerted activities of combinations in the practice of coercive picketing, boycotting and other overt concomitants of a strike and forbade not only employers but employees and combinations of either from engaging in certain unfair labor practices deemed detrimental to the State's welfare.

The purpose of the Wisconsin Employment Peace Act and the public policy of the State in respect thereto is plainly and unmistakably set forth in *Sec. 111.01 of the Act*. It is therein stated that there are three major interests involved in every strike, namely, the public, the employee and the employer; that industrial peace, regular employment and adequate income for the employee and uninterrupted production of goods and services are promotive of all these interests which are dependent upon peaceful adjustment of whatever controversy may arise; that the primary rights of third parties should not be invaded; that negotiations of terms and conditions of work should result from voluntary agreement between employer and employees; that standards of fair conduct in employment relations should be established.

By *Sec. 111.04* of the Act it is made clear that every employee in the exercise of his right to self-organization and collective bargaining shall have the free and unfettered right to join or not join any labor organization. The very first labor practice condemned by the Act is the coercion or intimidation of a worker in the enjoyment of his legal rights or the intimidation of his family, the picketing of his domicile or injury to the person or property of a worker or his family whether committed by the employer (*Sec. 111.06 (1) (a)*) or by a fellow employee (*Sec. 111.06 (2) (a)*) — either individually or in concert

with others (*Sec. 111.06 (3) Wis. Stats.*). Other provisions of *Sec. 111.06 Wis. Stats.* further protect the non-union worker and the union worker in the exercise of their legal rights by condemning as unfair labor practices specific coercive activities. Thus, for the first time in Wisconsin the workers' right to self-organization and collective bargaining was freed from *all* coercion, force and fraud.

It is adult sophistry or sophomoric immaturity to claim as Petitioners do in their Brief (pp. 29 and 30) that there did not exist such "clear and present danger of substantive evils" in concerted picketing, boycotting and other overt concomitants of a strike conducted by powerful labor combinations as to warrant the State of Wisconsin enacting the Employment Peace Act. To repeat this claim during a period of National Defense Armament and even now when we are in a State of War is indefensible. Now, if ever, the sovereign police power of the State making for stabilization of employment, adequacy of income, uninterrupted production of goods and services and peaceful adjustment of labor controversies is of paramount importance. Now, if ever, we must have unity and security. Strikes like wars are never profitable, but are extremely wasteful — economically, politically and socially. Detruction of workers' jobs by impulsive and short-sighted labor leaders calling strikes contrary to the wishes of the workers themselves is suicidal in this economic world.

If the workers themselves may combine under the state and federal law to organize and select collective bargaining units and exclusive bargaining representatives by a majority vote, then why may they not likewise ascertain the question of fact pertaining to that matter particularly within their personal knowledge, namely, whether the wages, hours, working conditions or any other substantial

item of labor controversy, is such in their particular employment as to warrant the calling of a general strike? Do not the majority labor under the same working conditions as the minority? Do they not share the gains and suffer the losses involved in labor matters, together as a unit? What is there so unreasonable about a regulation that checks the abuse of power in the hands of large labor combinations by requiring them to first let the workers decide by secret ballot among themselves whether their grievances with the employer are so great as to warrant the use of concerted, coercive instrumentalities of industrial strife or whether they should submit their grievances to the Wisconsin Employment Relations Board for arbitration (*Sec. 111.10 Wis. Stats.*), mediation (*Sec. 111.11 Wis. Stats.*) or for an order requiring the offending employer or others to cease and desist from unfair labor practices (*Sec. 111.06 and 111.07 Wis. Stats.*)?

There can be no serious question about the fact that *Sec. 111.06 (2) (e) Wis. Stats.* when considered with other provisions of the Act is narrowly drawn and specifically aimed at a serious encroachment upon public and private interests. It must be admitted that *Sec. 111.06 (2) (e)* specifically refers to concerted or cooperative action of a group for it provides that it shall be an unfair labor practice for an employee (or any group of persons, *Sec. 111.06 (3)*) —

> "to cooperate in engaging or promoting or inducing picketing, boycotting or other overt concomitants of a strike unless a majority of any collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

As the State Supreme Court noted in its opinion (S. R. 56):

> "Par. (e) by its terms does not apply to an individual. An individual cannot cooperate with himself. Subsec. (e) does not forbid an employee to quit his employment individually or in concert with others."

The Legislature further provided by *Sec. 111.15 Wis. Stats.* that the Act shall not be construed to impede the right to strike and the right of individuals to work or to invade unlawfully the right of free speech. Even if an employee is found guilty of an unfair labor practice because of failure to comply with *Sec. 111.06 (2) (e)* he loses only the benefits granted employees under the Act but retains all his rights under the Constitution, the statutory law and the common law as provided by *Sec. 111.07 (1) Wis. Stats.*, and as stated by the State Supreme Court (S. R. 58 and 59). In addition, the State Supreme Court stated that it did not deal with anything approaching peaceful picketing in the case at bar, but that the Unions, their officers and employees being guilty of violence were not in a position to raise any question respecting the right peacefully to picket or the right of free speech, and, even if they could, under the statute and the order of the Board as interpreted and construed by the Court, freedom of speech and the right peacefully to picket as described in the *Thornhill case*, was in no way interfered with (S. R. 70-71). This judgment of the Supreme Court of the State of Wisconsin is conclusive as to the construction and the application of the state labor statute under review (*Senn v. Tile Layers Protective Union*, 301 U. S. 468; *Læuf, et al., v. Skinner & Co., Inc.*, 303 U. S. 323).

Other distinguishing features of the Wisconsin Employment Peace Act indicative of the fact that it is narrowly drawn and specifically aimed at serious encroachments upon the personal and the property rights of others by large powerful combinations acting in concert are:

(1) It is neither penal nor criminal in its nature and provides for neither fines nor imprisonment for the commission of the unfair labor practices enumerated therein (*Sec. 111.07 (4) Wis. Stats.*).

(2) It makes no provision by way of reparation or restitution to the employer or employee for the civil wrongs suffered by the commission of unfair labor practices but relegates the parties to their remedies at law and equity to be obtained in separate civil proceedings (*Sec. 111.07 (1) Wis. Stats.*).

(3) It not only recognizes the right of employees to organize (*Sec. 111.04 Wis. Stats.*) but forbids interference therewith (*Sec. 111.06 (1) Wis. Stats.*).

(4) It cautiously provides that nothing therein shall be construed so as to invade unlawfully the right to free speech, or to interfere with or impede or diminish in any way the right to strike or the right of individuals to work (*Sec. 111.15 Wis. Stats.*).

D. Equal Protection of the Law Is Not Denied by the Majority-Minority Classification of Sec. 111.06 (2) (e) Wis. Stats. For It Is an Accepted Reasonable Form of Legislative Classification in Labor Matters.

The Petitioners argue at length in their Brief (pp. 34-38) that the majority-minority classification provided by Sec. 111.06 (2) (e) Wis. Stats. is arbitrary, unreasonable, indefinite and harsh in its operation. Political economy teaches us that the right aim of legislation is the carrying out of the principle of utility, or, in other words, the proper end of every law is the promotion of the greatest happiness for the greatest number. We know from the science of jurisprudence that a right is nothing more than a permission to exercise certain material powers and upon

certain conditions to obtain protection, restitution or compensation by the aid of public force (Cf. *Mr. Justice Holmes, The Common Law,* p. 214; *John Austin, Jurisprudence,* 5th Ed. Lecture 6).

Now the "public force" that is behind the law under question is the force of the mandate of the Legislature of the State of Wisconsin as contained in *Sec. 111.06 (2) (e) Wis. Stats.* The Legislature, not the workers by majority vote, has definitely determined what constitutes unfair labor practices as a matter of law in the State of Wisconsin; the workers are merely required to meet fixed legislative standards for the safety of themselves, the employer and the public generally. National unity and security in the uninterrupted production of goods and services, the stabilization of employment, the adequacy of workers' income and the peaceful adjustment of labor controversies are thereby obtained. The workers ascertain by secret ballot the question of fact, namely, *whether the dispute with the employer is so substantial and meritorious as to warrant a general strike.* They do not determine whether any worker may strike or work. They do not determine whether any worker may peacefully picket or otherwise truthfully publicize the facts of a labor controversy. When such fact of substantiality or lack of substantiality in a labor controversy has been ascertained, fixed legislative standards have been met and the law is self-executing in determining what *concerted and coercive instrumentalities of industrial strife may or may not be used in both an authorized and an unauthorized strike. Sec. 111.06 (2) (e) Wis. Stats.* as construed by the Wisconsin Supreme Court, aided by explicit statutory provisions (*Sec. 111.15 Wis. Stats.*) prohibiting any construction that interferes with the right to strike or the right to free speech, applies only to an unauthorized strike (S. R. 56). The attempted use

of concerted picketing and boycotting in an unauthorized strike is determined to be merely an unfair labor practice — not a crime resulting in the imposition of fines or imprisonment and not even a civil wrong entitled to legal damages by way of reparation. Although one may be found guilty of an unfair labor practice by reason of the provisions of *Sec. 111.06 (2) (e) Wis. Stats.*, he still retains all his rights under the Constitution, the common law and other state statutes, for it is recognized by *Sec. 111.07 (1) Wis. Stats.* that nothing in the Wisconsin Employment Peace Act shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction. This is fully explained in the State Supreme Court's original opinion (S. R. 56-61).

Sec. 111.06 (2) (e) Wis. Stats. is a mere application of the Majority Rule which is fundamental in the attempt of the Legislature and of Congress to regulate labor relations. It is the principle upon which the National Labor Relations Act and the Railway Labor Peace Act and the Wisconsin Employment Peace Act are based. It is the principle whereby the most important affairs of life are determined in the legislative, judicial and executive departments of our democratic form of government. It is the familiar principle upon which the equitable maxim "Equality is Equity" is based. In a labor election held for any purpose the vote of each worker represents an equity. The majority vote represents the majority of the equities. The "group interest" of all the workers is prior and paramount to the "individual interest" of a single worker who by force of his association with his fellow-workers subjects and subordinates his personal selfish interest. If a single worker does not agree with the majority, his right to strike, continue work, peacefully assemble with other members of the minority, protest, reason, speak

freely and publish truthfully the facts of the labor dispute is not even regulated, much less prohibited, by the Wisconsin Employment Peace Act and especially *Sec. 111.06 (2) (c)* thereof. So the Act reads and so the State Supreme Court decided (S. R. 55, 56, 58, 64).

Trade unions themselves govern both their internal affairs with their members and their external relations with the employer and the public by the Majority Rule. Labor's philosophy advocating the all-union or closed shop clearly recognizes and in fact is based on this rule. Was Labor ever heard to demand a unanimous vote of the workers before obtaining a closed shop in any plant? Was Labor ever heard to complain that a majority vote of the workers for a closed shop was insufficient, denied equal protection of the law and resulted in an arbitrary, unreasonable and discriminatory classification of legislative subjects (Petitioners' Brief, p. 34)? Has Labor ever demanded unanimity of vote for the election of union officers? Or, to fine, suspend or expel a recalcitrant member? Or, to call a strike, picket and boycott any particular industry or its non-union employer? Certainly not. The group interest of the majority determining the substantiality and the merit of these questions prevailed against the wishes of any dissenting member or opposing minority. Again we ask, why may not the Legislature adopt similar procedure in the exercise of its police powers relating to labor relations that affect the public interest and the national unity and security so profoundly? Why may not the State Legislature in that field of economic coercion not involving the mere exercise of the right of free speech — termed in the *Thornhill case* the "allowable area of State control" — say that a majority after complying with certain statutory requirements (a majority vote by secret ballot to call a strike) may exercise certain coercive in-

strumentalities of industrial strife — concerted picketing, boycotting, and overt concomitants of a strike — and that the minority not complying with such statutory requirements may not use such coercive instrumentalities upon the majority and thereby interfere with the majority in the enjoyment of their legal rights — especially the right to work, self-organization and finality in respect to their vote in collective bargaining matters? It is clear, as the Milwaukee Circuit Court noted in respect to the Majority-Minority provisions of classification of Sec. 111.06 (2) (e) Wis. Stats. (R 46):

> "These provisions of the Act are reasonable as an effective regulation entirely germane to the scope and aims of the police power of the state to enable groups of workers, many times numerically large, to give free and unhindered expression to their individual convictions and as to whether they consider differences with their employers of sufficient gravity to warrant the cessation of their employment with the attending hardships to themselves and their families during periods which many times become protracted as impressively brought home in the cases at bar."

The difficulties Petitioners conjecture that workers will have under the statute to obtain the necessary majority vote by secret ballot are more imaginary than real. The hypothetical cases they cite in their Brief (pp. 34-38) are doubtful and extreme. These dialectics like generalizations are always odious. For example, what constitutes mass picketing? Why should two or three pickets at a single narrow entrance of a small retail store constitute mass picketing and, therefore, unlawful conduct in one case, and twenty or thirty pickets distributed before several wide entrances of a large manufacturing plant not constitute mass picketing and, therefore, lawful conduct in another case. The answer is that each case must be decided on its own facts and circumstances. Application of the

law to a particular case must be left to the "trier of fact" if there is room for conflicting inferences. With good reason it was said in the case of *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453:

> "Whatever terminology is used, the criterion is necessarily one of degree and must so be defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided for by the great concepts of the Constitution, such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion. There is, thus, no point in the instant case in a demand for the drawing of a mathematical line and what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

In the Petitioners' Brief (pp. 34, 74-78), the alleged right to use concerted picketing, boycotting and other overt concomitants of an unauthorized strike whenever and wherever Petitioners see fit and however destructive to employers, working employees and the public, is claimed comparable to the right of a citizen in the exercise of free speech to protest the results of a public election. In comparing the right to seek the change of an employee's vote on a labor question with the right of citizens in a public election to change the votes of other citizens on political questions, the Petitioners overlook the undeniable fact that the votes of citizens on political questions may not lawfully be changed by threatening them with the loss of their means of livelihood, their right to self-organization, liberty, property and freedom from force, fear and fraud.

There is a democratic and lawful way of obtaining relief if the Petitioners are justly entitled thereto. Just as they now so vehemently protest against the mandates of the Wisconsin Legislature as construed by the State Supreme Court, so also may they protest to the people of the State of Wisconsin and their legislative representatives against the wisdom or folly of the particular labor statute under attack or any other statute. Certainly, the courtroom is not the arena for debating issues of legislative policy.

The fallacy in Petitioners' argument against the Majority Rule is made more apparent when we carry it through to its logical conclusion. The Petitioners would apply the Majority Rule in creating collective bargaining units and also in electing exclusive bargaining representatives. Here, however, they stop. According to their argument any member of a collective bargaining unit should be allowed, in the exercise of free speech, not only to express freely his own opinion and protest the decision of the majority, but also to reject with or without cause all the labor matters negotiated by the duly elected exclusive bargaining representative and accepted by the majority of his fellow workers. Furthermore, he should be allowed the use of destructive instrumentalities of concerted economic force in conjunction with powerful nation-wide labor combinations *in order to coerce the members of the majority who voted contrary to his wishes to change their vote.* He should be permitted thereby to threaten them with the loss of their jobs by destroying their employer's business. He should be permitted to deprive them of the right of self-organization by denying finality to their vote on all important labor matters. If threats and intimidation fail, usually violence and breaches of the peace ensue, as in the case at bar. All this is done

theoretically in the name of free speech, but practically with an eye to defeat others in the exercise of their rights to self-organization and collective bargaining. Only economic chaos can follow from this philosophy of Discord and Destruction. It cannot be the law in any civilized community which hopes to exist during the present turbulent times as a government of laws rather than a government of men.

The Oregon case of *A. F. of L. v. Bain*, 106 Pac. (2d) 544, cited in Petitioners' Brief (pp. 35, 36) is easily distinguishable for it involved *a penal statute* directed against *individual* action, including the exercise of free speech in *any and every form of peaceful picketing.* (See Wisconsin Supreme Court's analysis of this case in S. R. 56, 57.) The Oregon statute was devoid of any protective provisions as contained in *Sec. 111.15 Wis. Stats.* preventing the unlawful invasion of free speech and in *Sec. 111.07 (1) Wis. Stats.*, preserving for an ex-employee participating in an unauthorized strike his rights under the Constitution, the Statutory Law and the Common Law. Furthermore, the Oregon statute was not narrowly drawn to cover the precise situation giving rise to the danger incidental to the use of certain coercive instrumentalities of an industrial strife conducted by *concerted action of labor combinations.* This is indicated in the split opinion of the Oregon Supreme Court when the majority said:

> "We are far from implying by our decision that proper regulatory measures may not be taken by the state to curb evils arising from activities of labor unions, as of every other group. No right is held absolute — not even the right to speak freely."

In their Brief (pp. 37 and 38) Petitioners question the propriety of applying the Majority Rule to human rights for fear that it might result in the sub-

stitution of principles of arithmetic for principles of morality. The inference that the principle of morality or "natural right" is possessed by the minority alone is illogical and untrue to the facts in the case at bar. Even if the minority were morally right, it would not be controlling upon the court in passing upon the constitutionality of a state statute. The cases holding this principle of law are numerous and collected in *11 American Jurisprudence*, pp. 800 and 801, wherein it is stated:

> "It is now generally recognized that the judiciary cannot annul or pronounce void any act of the legislature on any ground other than that of repugnancy to the Constitution. It was at one time supposed that the courts could resort to the principles of natural justice or common right and pronounce a legislative act void because in conflict with such supposed principles. This view, however, has been finally abandoned. The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or Federal Constitutions, and all acts of the legislature are valid unless they so conflict. Hence, if a given statute is not clearly repugnant to some constitutional guaranty, the courts are without power to interfere, for they do not sit to review or revise legislative action within its constitutional limits. Therefore, the courts have no right to set aside, arrest, or nullify a law passed in relation to a subject within the scope of the legislative authority on the ground that it conflicts with their notions of natural, social, or political rights of the citizen not guaranteed by the Constitution itself."

In short, every citizen is entitled to *equal justice under the law*, not under the various conflicting codes of morality taught throughout the world.

In Petitioners' Brief (p. 60) the constitutional right of free speech is also compared with the right of freedom of religion, both of which are assumed to be absolute

rights. The Petitioners imply in their argument that the State of Wisconsin does not have the sovereign police power to regulate reasonably the concerted exercise of the constitutional right of freedom of religion and, therefore, it may not so regulate the coordinate constitutional right of free speech. The answer to this argument is that the State of Wisconsin has the police power to regulate reasonably both of these constitutional rights. Thus, in the case of *Minersville School District, et al., v. Gobitis*, 310 U. S. 586, it was held by this Court that the local Board of Education in Pennsylvania and the Legislature of that state could constitutionally require children to take the oath of allegiance to the flag and give the salute without infringing upon the due process of law or invading the right of religious freedom and liberty guaranteed by the Fourteenth Amendment. It was stated by the Court (p. 594):

> "The right to freedom of religious belief, however dissident and however obnoxious to the cherished beliefs of others — even of a majority — is itself the denial of an absolute. But to affirm that the freedom to follow conscience has itself no limits in the life of a society would deny that very plurality of principles which, as a matter of history, underlies protection of religious toleration. • • •
>
> "The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. • • •
>
> "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. • • • Nor does the freedom of speech assured by Due Process move in a more absolute circle of immunity than that enjoyed by religious freedom • • • National unity is the basis of national security. To deny the legislature the

right to select appropriate means for its attainment presents a totally different order of problem from that of the propriety of subordinating the possible ugliness of littered streets to the free expression of opinion through distribution of handbills."

Also, in the case of *Cantwell v. Connecticut* (1940), 310 U. S. 296, which involved the constitutionality of a Connecticut statute affecting the right of religious freedom, this Court observed at pp. 306 and 307:

> "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. * * *.
>
> "Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations."

It will, therefore, be seen that the right of free speech, press, assemblage and religion are not absolute, but qualified rights and subject to reasonable limitation whenever there is a clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, comfort, peace, order and welfare.

E. The Qualified Right of Free Speech Is Neither Involved Nor Invaded.

Petitioners claim in their Brief (pp. 23-34) that in the exercise of their coercive activities as labor combinations, they may use certain instrumentalities of economic force and industrial strife (concerted picketing, boycotting and

other overt acts concomitant of a general strike) whenever and wherever they see fit and however destructive to the employer, working employees and the general public under the guise of free speech and the State of Wisconsin is powerless to control them. **This is an abuse of the right of free speech. History and Law have always looked upon this right as a Shield against Oppression and not a Sword of Aggression** (Cf. *Lovell v. Griffin*, 303 U. S. 444, 451; *Thornhill v. Alabama*, 310 U. S. 88, 101, 102). Reasonably limited, this freedom is a *"privilege"* in a free government but without such limitation it might become the *"scourge of the republic"* (Justice Joseph Story, *On the Constitution*, Volume 2, Sec. 1580, p. 634).

It is a fundamental principle, long established, that freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right beyond the reasonable control of the State and the Federal Government (*Gitlow v. New York*, 268 U. S. 652). As Mr. Justice Holmes stated in *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 at 249:

> "The most stringent protection of free speech * * * does not even protect a man from an injunction against uttering words that may have all the effect of force."

Under such circumstances speech becomes what has been called "a verbal act" and is as much subject to injunction as the use of any other force whereby property is unlawfully damaged (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418). The right of free speech has never been considered to make impossible civil remedies or criminal prosecution for libel, duress or fraud although speech was the agency in each case. The distinction between the exercise by one of his right of freedom of speech and the actual use of the spoken word as an instrumentality to

overpower the will of another is well understood and constitutes the dividing line between what one may do and what one may not do (*Wis. Labor Relations Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 496; 279 N. W. 673). It is a cardinal error to affirm that the right of free speech is so absolute that it may be exercised under any circumstances and without qualifications; like other rights that exist in a civilized society it must always be exercised with reasonable regard for the conflicting rights of others (*Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229). The same is true in regard to the exercise of the constitutional right of religious freedom (*Cantwell v. Connecticut*, 310 U. S. 296; *Minersville School District, et al., v. Gobitis*, 310 U. S. 586) and free press and assemblage (*Schneider v. State*, 308 U. S. 147; *Hague, et al., v. C. I. O.*, 307 U. S. 496).

Petitioners claim in their Brief (pp. 72-74) that the Wisconsin Supreme Court in its opinion improperly used the term "coercion" so as to brand as unlawful certain peaceful activities within the constitutional right of free speech. It is very clear throughout the state court's original opinion that when it used the terms "coercion" and "coerce" it was using them in a generic sense, recognizing the fact that there exists in labor relations permissive coercion in the sense of lawful compulsion or fair persuasion and unpermissive coercion in the sense of unlawful compulsion and unfair persuasion. This is a very common use of the term in labor law literature. Thus, in the *American Furniture Co. case*, 222 Wis. 338, 268 N. W. 250, the state court used the terms "coercion," "coerce," "pressure" and "economic weapon" to express lawful conduct on the part of labor unions and even on the part of an employer in inducing his employees who were unorganized to join a particular labor union. The activi-

ties contained in *Sec. 103.53 Wis. Stats.* are recognized as acts of permissive coercion in labor controversies in the State of Wisconsin. These acts include not only conduct strictly within the exercise of one's constitutional right of free speech but many other activities permitted by the State to disputants in labor controversies. Of course, those activities that are strictly within the exercise of the constitutional right of free speech are not affected by the Wisconsin Employment Peace Act which provides that nothing therein shall be construed to invade unlawfully the right of free speech (*Sec. 111.15 Wis. Stats.*).

When it comes to "unpermissive coercion" affecting an employee's right to self-organization or collective bargaining, the term "coercion" has clear and definite contours. Thus, when this Court had under consideration a provision of the Railway Labor Act to the effect that representatives of employees shall be designated without interference, influence or coercion, it stated in the case of *Texas & New Orleans R. Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548, 568:

> "The intent of congress is clear with respect to the sort of conduct that is prohibited. *'Interference' with freedom of action and 'coercion' refer to well-understood concepts of the law.* The meaning of the word 'influence' in this clause may be gathered from the context. *Noscitur a sociis. Virginia v. Tennessee*, 148 U. S. 503, 519. The use of the word is not to be taken as interdicting the normal relations and innocent communications which are a part of all friendly intercourse, albeit between employer and employee. 'Influence' in this context plainly means pressure, the use of the authority or power of either party to induce action by the other in derogation of what the statute calls 'self-organization.' *The phrase covers the abuse of relation or opportunity so as to corrupt or override the will, and it is no more difficult to appraise conduct of this sort in connection*

with the selection of representatives for the purposes of this act than in relation to well-known applications of the law with respect to fraud, duress and undue influence." (Italics ours.)

In the very recent cases of *Virginia Electric & Power Co. v. National Labor Relations Board*, Oct. 1941 Term Docket No. 25, 26 (still unreported) decided by this Court on December 22, 1941, it was said in respect to the use of free speech as an instrument of coercion by an employer in alleged violation of the rights of his employees under the National Labor Relations Act:

> "Certainly conduct, though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act.
>
> "In determining whether the company actually interfered with, restrained, and coerced its employees the board has a right to look at what the company has said as well as what it has done.
>
> "Whether there are sufficient findings and evidence of interference, restraint, coercion and domination without reference to the bulletin and the speeches, or whether the whole course of conduct evidenced in part by the utterances was aimed at achieving objectives forbidden by the act are questions for the board to decide upon the evidence."

It is further claimed by Petitioners in their Brief (pp. 68-71) that the State Legislature has no constitutional power to regulate the use of weapons of industrial strife, such as picketing and boycotting, by classifying strikes as authorized and unauthorized strikes. This is merely repeating in other words there can be no permissive and unpermissive coercive concerted activities affecting labor relations and that all "economic pressure," "persuasion," and "coercive conduct" whether committed by individuals

or by groups are beyond the reasonable regulation of the State's police powers.

This, of course, cannot be the law in any civilized community which hopes to exist during the present turbulent times. It certainly is not the law in the United States, and particularly not in the State of Wisconsin. Neither the Common Law nor the Fourteenth Amendment to the United States Constitution confirms the absolute right to strike (*Dorchy v. State of Kansas* (1926), 272 U. S. 306). The right to institute and maintain a boycott cannot be supported under the constitutional guarantee of freedom of speech or assemblage (*Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418; *Robison v. Hotel & Restaurant Employees*, 35 Ida. 418, 207 P. 132, 27 A. L. R. 642; *11 Am. Jur., Sec. 322*, and cases there cited). "The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern" (*Thornhill v. Alabama* (1940), 310 U. S. 88, 103). In dealing with labor relations the State in the exercise of its police power has necessarily a wide field of discretion in order that there may be suitable protection of health and safety and that peace and good order may be promoted through regulations designed to insure peace and stabilization in employment (*Wis. Labor Relations Board v. Rueping Leather Co.*, 228 Wis. 473; 279 N. W. 673; *American Furniture Co. v. I. B. of T. C.*; 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Assoc.*, 222 Wis. 383, 268 N. W. 270, affirmed (1937) 301 U. S. 468).

The Petitioners cite throughout their Brief passages from this Court's decision in the *Thornhill v. Alabama* (310 U. S. 88) and the *Carlson v. California* (310 U. S. 106) cases in support of their alleged legal conduct in

picketing. They ignore the record of violence in the case at bar. They overlook the facts and the nature of the statutory provisions under review in both the *Thornhill* and the *Carlson cases*. Neither the Milwaukee Circuit Court (R. 43-44) nor the Wisconsin Supreme Court (S. R. 55, 56, 70-71) denied the imperative legal effect of these cases, but fully discussed and clearly distinguished them on the basis of the factual situation appearing in the record and the nature of the Wisconsin Employment Peace Act under review. They pointed out that unlike the Wisconsin Statute the enactments in the *Thornhill* and the *Carlson cases* contained criminal terms and penal clauses providing for fines and imprisonment and were so applied by the State Courts as to prohibit *even an individual from peacefully publicizing in any manner whatsoever the true facts of a labor dispute*. They pointed out that the individuals in the above cases were found not guilty of any threats, intimidation, coercion, violence or breach of the peace for, "all words spoken were uttered in a peaceful and orderly manner without putting anyone in fear." They observed that the Statutes that were struck down by this Court as unconstitutional in the above cases were not narrowly drawn to cover a clear and present danger of a substantive evil and did not evidence care in the balancing of public and private interests for as this Court stated (*Thornhill case*, 310 U. S. 88 at 97, 98, 99, 104, 105):

> "A like threat is inherent in a *penal statute, like that in question here*, which does not aim specifically at evils within the allowable area of State control, but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute and exercise of freedom of speech or of the press.
>
> * * *
>
> "Sec. 3448 has been applied by the State Courts so as to prohibit *a single individual from walking*

slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor.

* * *

"The statute as thus *authoritatively construed* and applied leaves room for no exceptions based upon either the *number of persons* engaged in the proscribed activity, the *peaceful character of their demeanor*, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute.

* * *

"The range of activities proscribed by Section 3448 whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested — including the employees directly affected — may enlighten the public on the nature and causes of a labor dispute.

* * *

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify *a statute narrowly drawn to cover the precise situation giving rise to the danger.* * * * *Section 3448* in question here *does not aim specifically at serious encroachments* on these interests and *does not evidence any such care in balancing these interests* against the *interest of the community and that of the individual in freedom of discussion* on matters of public concern." (Italics ours.)

The Wisconsin Supreme Court observed implicity the rule of this Honorable Court stated in both the *Thornhill* and the *Carlson cases*, to-wit:

"The power and duty of the State to take adequate steps to preserve the peace and to protect the pri-

> vacy, the lives and the property of its residents cannot be doubted."

Lastly, in full recognition of this Court's decision in the above cases, the State Supreme Court stated explicitly in its original opinion (S. R. 56) and again in its final opinion (S. R. 71) that *Sec. 111.06 (2) (c)* of the Wisconsin Act does not prohibit peaceful picketing as described in the *Thornhill case*. Where, therefore, is the basis for the Petitioners' claim that all picketing including the free communication of facts in a labor dispute by any means whatsoever, was prohibited by the Wisconsin Employment Peace Act as construed by the State Supreme Court?

It is a strain upon our credulity to hear Petitioners and their attorneys, who have engaged in labor activities for many years, confess at this late date that they do not know what constitutes peaceful picketing under the Wisconsin law (p. 52 of Brief). It is amusing to note the facility with which they define this term when they argue the rights of labor in other cases. The alleged "vague contours" of the term "picketing" as used in the Wisconsin Statutes and decisions did not confuse them in the least when they argued for those rights in the cases of *American Furniture Co. v. I. B. of T. C.* (1936), 222 Wis. 338, 268 N. W. 250; *Senn v. Tile Layers Protective Union* (1936), 222 Wis. 383, 268 N. W. 270, 268 N. W. 875; *Wis. Labor Relations Bd. v. Rueping Leather Co.* (1938), 228 Wis. 473, 279 N. W. 673. If further legal determination of what constitutes peaceful picketing in Wisconsin was needed, the Petitioners well knew they could be found in the decisions of this Court construing and applying Wisconsin labor legislation in the cases of *Senn v. Tile Layers Protective Union*, 301 U. S. 468, and *Lauf v. E. G. Shinner & Co., Inc.*, 303 U. S. 323. The Milwaukee Circuit Court had no difficulty in finding (R. 45):

> "All of the terms in the Employment Peace Act are sufficiently definite and have been judicially defined many times. * * * The Act is sufficiently definite and certain in terminology which may be said to include 'well-understood concepts of the law,' (*Wisconsin Labor Relations Bd. v. Rueping Leather Co.*, 228 Wis. 473, 495)."

The State Supreme Court by process of elimination definitely ruled out any general prohibition of peaceful picketing as described in the *Thornhill case* in the enforcement of *Sec. 111.06 (2), (c) Wis. Stats.* in the State of Wisconsin when it stated in its original opinion (S. R. 56):

> "The term 'picketing' as used in subsection (2) (c) of Sec. 111.06 Stats., 1939, does not include acts held in the *Thornhill case*, supra, to be within the protection of the Constitutional guaranty of the right of free speech. The express language of the Act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill case* says the State has the power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents.'"

This language was repeated almost verbatim in the final opinion of the Supreme Court denying the motion for rehearing (S. R. 70-71).

It is suggested by Petitioners in their Brief (pp. 31-33) that they were denied the right to picket peacefully in the case at bar because of the absence of an employer-employee relationship or a labor dispute as defined by *Section 111.02 (8) Wis. Stats.* (p. 19 of Brief). This is not the fact. There never was a question of "stranger picketing" in the case at bar. No claim was ever made that the Petitioners, their officers or members were denied the right to picket peacefully because of the absence of an employer-employee relationship, for all the parties involved and the State Courts recognized the right to picket peace-

fully or free speech was not dependent upon such relationship (*American Federation of Labor v. Swing*, 312 U. S. 321). *Sec. 111.02 (8) Wis. Stats.* defining a labor dispute as a controversy between an employer and the majority of his employees and *Sec. 103.62 (3) Wis. Stats.* having a similar definition were completely ignored by the parties and the State Courts in the case at bar because *Sec. 111.15 Wis. Stats.* expressly admonished the State Courts not to construe the Wisconsin Employment Peace Act so as to invade unlawfully the right of free speech. The only issue in this case prior to the calling of the strike was the right of the Union to a closed shop without first obtaining a three-fourths vote by secret ballot as required by *Sec. 111.06 (1) (c) Wis. Stats.* and the award of the Arbitration Board (Exhibit 9, R. 266). After the strike was called the only issue was the right of the State of Wisconsin in the exercise of her sovereign police powers over all manifestations of force and coercion within her borders to regulate *concerted* picketing and *concerted* boycotting by powerful labor combinations engaged in violence, coercion, intimidation, and other unfair labor practices, including the failure to obtain a majority vote of the workers by secret ballot before engaging in the above overt concomitants of a general strike (*Sec. 111.06 (2) (e) Wis. Stats.*). The Petitioners' constitutional attack was directed solely at this last mentioned statute and no other. The Wisconsin Supreme Court stated in its original judgment (S. R. 53):

> "While the briefs on both sides contain much matter relating to the history, background and philosophy of labor legislation, the *sole* contention made here is that subsec. (2) (e) 111.06 Stats. 1939 is unconstitutional and void * * *."

Again the State Court made the issue clear when it stated

in its second opinion after denying the motion for rehearing (S. R. 70-71):

> "We did not deal with every provision contained in the Employment Peace Act for the reason, as stated in the opinion, upon this appeal Sec. 111.06 (2) (c) Stats. 1939, was the only section of the statute drawn in question and it is with the construction of that section that we deal and it is explicitly so stated in the opinion."

In the face of this record, what justification is there for the attempt to interject at this late date a feigned issue concerning "stranger picketing"?

II.

The Order of the Board and the Enforcing Judgment of the State Courts Constitutionally Apply the Wisconsin Employment Peace Act to the Proven Facts in the Case.

A. The Record Shows Violent Means Were Adopted for Unlawful Purposes and Continued Fear and Intimidation Exist.

It is claimed by Petitioners that the Order of the Board confirmed by the judgment of the State Courts was not based upon such "extreme and flagrant violence", as existed in the *Meadowmoor case*, that fear and intimidation no longer exist in the case at bar because the Petitioners were granted a qualified stay of the Board's Order pending an appeal to the Wisconsin Supreme Court, and there has been no "continuing and recurring violence" (pp. 15-16, 38-49 Brief). Must the people of Wisconsin wait until there is such "extreme and flagrant violence" as existed in the *Meadowmoor case* — 53 windows broken, 8

trucks seized, 9 stores bombed and burned, 4 other assaults and destruction of property — before industrial peace can be restored and the employer, the working employees and the general public can be protected in their legal rights by the exercise of the State's police power? When this Court stated in the *Meadowmoor case* (312 U. S. 287, at 295) "The Fourteenth Amendment still leaves the State ample discretion in dealing with manifestations of force in the settlement of industrial conflicts" did it intend to limit those "manifestations of force" to only the "extreme and flagrant" types of violence as existed in the *Meadowmoor case?* If so, what is left of the State's "ample discretion" in Labor matters? Certainly force can manifest itself not only by physical violence, but also by other coercive activities that give rise to fear and intimidation, and destroy the free will of man. It is a matter of common knowledge that often "force" and "coercion" generated by means other than physical violence are extremely destructive, fearful and intimidatory — even more so than if physical violence had actually been used.

It suffices to say in the case at bar that the Wisconsin Labor Relations Board, the Milwaukee Circuit Court and the Wisconsin Supreme Court have determined the question of fact that a background of violence creating fear and intimidation existed and warranted the issuance of the Cease and Desist Order now under review. Thus, the Wisconsin Supreme Court stated (S. R. 58, 63):

> "In this case it is undisputed that numerous assaults were committed by pickets, that the pickets acted in concert; that the fines of these pickets were paid by the Unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. * * * The acts committed by the petitioners as shown by the findings in this case

would have justified injunctive relief under the Common Law or any labor relations statute, either state or federal."

This Court can reject this determination of fact only if it can say, "It is so without warrant as to be a palpable evasion of the Constitutional guaranty here invoked." (*Meadowmoor case*, 312 U. S. 287, 294.)

The true record of the violent means adopted by the Petitioners — including physical violence, mass picketing, secondary boycott, crimes and misdemeanors — is shown in detail on pages 6 to 13 of the Plankinton House Company Brief in Opposition to the Petition for Writ of Certiorari, and for the sake of brevity is not repeated here, but a reading by the Court is invited. Likewise the continuity of the fear and intimidation generated by the Petitioners' past acts of violence and other unfair labor practices affecting particularly the working employees in the enjoyment of their legal rights to work, self-organization, collective bargaining and security in their person and property is fully covered on pages 16 to 18 of the last mentioned brief.

The real object of the Petitioners' unlawful concerted activities as shown by the record is also discussed fully at pages 13 to 16 of the same brief. The undisputed evidence disclosed the Petitioners were not satisfied with picketing peacefully as defined in the *Thornhill* and *Carlson cases*. They were not content with publicizing the true facts of a labor dispute, for if they were they would be forced to admit that they destroyed industrial peace in Milwaukee by cancelling negotiation proceedings, demanding arbitration and then rejecting the arbitrators' award, and later calling a strike for the purpose of forcing the employer to:

(1) Grant them a closed shop contrary to law, (Sec. 111.06 (1) (c) Wis. Stats.) and without taking any vote therefor (R. 226, 266).

(2) Bargain collectively with the representative of less than a majority of his employees contrary to law (Sec. 111.06 (1) (e) Wis. Stats.) when another had been duly certified by the Board as the exclusive representative of his employees and had a valid collective bargaining contract with the employer (S. R. 39, 40).

(3) Interfere with and coerce his employees in their legal rights including the right to self-organization and to join or not join a union, contrary to law (Sec. 111.06 (1) (a), Sec. 111.04 Wis. Stats.) so as to give the Petitioners exclusive collective bargaining rights.

The unions were not content with free competition and the true communication of thoughts in the open market of ideas. They were not satisfied with an appeal to reason in order to inform and persuade the public and the working employees to lend support to particular trade unions (Cf. *A. F. of L. v. Swing*, 312 U. S. 321). On the contrary, they sought to coerce by resorting to concerted acts of extreme violence and realistic picketing enmeshed with a destructive primary and secondary boycott resulting in continuing fear and intimidation of the suppliers of merchandise, working employees and the business customers of the Plankinton House Company. Under these circumstances the language of this Honorable Court in the *Meadowmoor case* (312 U. S. 287, at 294 and 295) is very pertinent in the case at bar, to-wit:

> "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the

Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a State through its Court cannot base protection against future coercion on an inference of the continuing threat of past misconduct.

"These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the State ample discretion in dealings with manifestations of force in the settlements of industrial conflicts."

The fact that the Milwaukee Circuit Court granted the Petitioners a qualified stay of its judgment and the Board's order pending an appeal to the Wisconsin Supreme Court as it believed the law (*Sec. 274.23 Wis. Stats.*) required as a matter of right rather than of discretion, does not alter the adjudicated fact — later authenticated by the Wisconsin Supreme Court — that *there was a background of violence generating fear and intimidation in the case at bar.* It was after the Wisconsin Supreme Court rendered its opinion in this case that it was definitely decided for the first time in Wisconsin that the issuance of a stay order pending an appeal was discretionary so far as the prohibitory, as distinguished from the mandatory, features thereof were concerned (*Carpenter Baking Company v. Bakery Sales and Drivers Local Union*, 237 Wis. 24, 297 N. W. 118). Consequently, there was no logical connection between the issuance of the qualified stay order by the Milwaukee Circuit Court and the claim by the Petitioners that no fear and intimidation

survived the past violence warranting the denial of the right to picket peacefully in the future.

B. The Record Shows the Unions Authorized, Participated in, and Ratified the Acts of Violence and Other Unfair Labor Practices.

A question is raised in the Petitioners' Brief (pp. 15, 50-51) with respect to the responsibility of the Unions for the unfair labor practices charged in the complaint, proved in the record and found by the Board and the Courts. It is elementary that the affirmance of an act by an agent may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction and that the affirmance of an unauthorized transaction may be inferred from a failure to repudiate it. (*Restatement of the Law on Agency,* Vol. 1, Sec. 92, 94, pp. 230-238.) *Sec. 103.54 Wis. Stats.* expressly provides that an officer or member of an association and the association participating or interested in a labor dispute may be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members, or agents upon proof of a preponderance of the evidence of:

(1) The doing of such acts by persons who are officers, members, or agents of any such association, and

(2) Actual participation in or actual authorization of such acts or ratification of such acts after actual knowledge thereof by such association.

In the case at bar authorization and ratification after actual knowledge were proven by the testimony of the Union Officers themselves to-wit:

(1) Alfonso Gamby, testified that he was the President of Local 122 and Chairman of the Executive Committee; that John Alexander kept a daily record of the men who were placed on the picket line and was appointed captain of the strike committee by Phil L. Valley, business agent, with the Executive Board's approval; that when men were placed on the picket line they were given cards and later paid off for picket duty; James O'Brien who was found guilty of violence on the picket line was so paid for his violent picketing (R. 218).

(2) Phil L. Valley testified he was the Union business agent, had supervisory control over the Union officers in their territory and saw to it that they kept their territory "clean"; he was authorized by the Union's Executive Committee to call the strike and had full power to appoint captains to handle the pickets (R. 83); he called the strike (R. 84) and ordered 75 to 80 men to form a picket line about the entrances of the hotels (R. 85). He was present at the time the florist truck pulled up to make a delivery of floral decorations to the Plankinton House on November 4, 1939, when John Heisdorf (Union Vice-President) and Charles A. McLaughlin (Assistant Business Agent and Secretary of the Union) assaulted and battered the delivery man; he knew of the arrest of John Heisdorf and Charles McLaughlin therefor. The Unions provided bail and legal counsel; a day or two thereafter Mr. Heisdorf was returned to the picket line (R. 85-87). The Unions also provided bail and legal counsel and paid the criminal fine for Mr. McLaughlin upon his arrest and subsequent conviction. Immediately thereafter the Unions returned Mr. McLaughlin to the picket line. He was again arrested for extreme violence on November 17, 1939, and again his bail and legal counsel were provided by the Unions, and upon conviction, his fine paid by the

Unions (R. 87). Mr. Valley knew about Mr. James O'Brien, a former Union member and prize fighter, who was arrested for assault and battery on the picket lines at the Plankinton House on November 17, 1939 (R. 88). Mr. Valley knew about Thomas J. O'Mahar, a member of the Union doing picket duty, who was arrested and convicted on November 14, 1939, for striking and kicking Edward Knopf, a bellboy at the Plankinton House. The Union again provided bail and legal counsel for Mr. O'Mahar and paid his fine and returned him to the picket lines (R. 89). Joseph Hofich is known to Mr. Valley as a member of the Union and captain of the pickets at the Plankinton House. Mr. Hofich was arrested by the police on November 19, 1939, for striking Rudolph Stano, a bellboy, several blows in the face with his clenched fist; Mr. Valley received the report on this assault and battery and the Union provided bail and legal counsel for Mr. Hofich (R. 89, 90). Later Mr. Hofich was found guilty and fined for this offense (R. 196). Thereafter, Mr. Hofich was returned to the picket line as *supervisor of pickets* (R. 97).

(3) John Alexander testified that he was Chairman of the strike committee, had complete charge of all the pickets, instructed them how to behave, and appointed picket captains. He placed Charles A. McLaughlin and John Heisdorf on the picket line. He instructed Thomas O'Mahar and Larry McAllen how to act on the picket line. He appointed Joseph Hofich captain of the pickets. After checking the record of James O'Brien with the Union records and his performance in the picket line, he paid Mr. O'Brien for performing picket duty (R. 95-99, S. R. 19, 20). The record discloses that James O'Brien as a picket not only assaulted and battered Paul Ziebell, an employed bellboy, on November 7, 1939 (R. 132-138, S. R.

19, 20), but on November 5, 1939, threatened Lester Raasch, an employed bellboy, with physical violence (R. 135-138) and on November 6, 1939, spit upon Lester Raasch while he was holding the hotel doors open for guests (R. 136).

Thus, it will be observed that the parties found guilty of violence were not "irresponsible strangers" who forced their way into the picket line but were high ranking union officers, picket captains and members of the Union in good standing, still retaining their supervisory powers and high Union offices (R. 97). Some of them have been found guilty of not only one so-called isolated violation or fugitive encounter but several distinct criminal offenses and nevertheless returned to the picket line after bail, legal counsel and even criminal fines were provided by the Unions. In the face of that record, can anyone help but conclude that the Unions authorized and participated in the unlawful acts of their leading officers and members?

The untimely resolutions, if any, of the Union Executive Board (R. 218) later reprimanding the law violators are simply self-serving oral declarations — never reduced to writing for inspection and verification. Needless to say the effect of those so-called resolutions was never very stimulating but, in fact, was destroyed by the Unions' permitting the self-same lawbreakers to return to the picket line as supervisors and captains after their criminal convictions. The self-professed Union apostle of peace, John Alexander, despite his national experience in Union activities from New York to San Francisco, supervised the pickets in the conduct of a sitdown strike at the Milwaukee Athletic Club in 1937 (R. 227, 228, S. R. 35, 36). He was the former President and business manager of the C. I. O. Hotel Employees' Union which he admitted was controlled by Communists, "out of twelve members of the

Executive Board of the C. I. O., nine were members of the Communist Party and it was under Communists' domination" (R. 225, S. R. 35). It might well be said that the violent conduct of the Unions, their officers and members, speak more convincingly than their flimsy words of mouth. Neither the Court nor the injured third parties are bound by the Unions' mere declaration but may seek and find the true purpose of their concerted action (*Schultz v. Frankfort, etc., Ins. Co.*, 151 Wis. 537, 546, 139 N. W. 386).

As stated by this Court of a labor controversy in *American Steel Foundries v. Tri-City Central Trades Council, et al.* (1921), 257 U. S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189:

> "When one or more assaults or disturbances ensue they characterize the whole campaign which became effective because of its intimidating character in spite of the admonitions given by the leaders to their followers as the lawful methods to be pursued, however sincere."

The observation of Mr. Justice Frankfurter in the recent case of *Milk Wagon Drivers Union, et al., v. Meadowmoor Dairies, Inc.*, 312 U. S. 287 at 295, is also very pertinent, to-wit:

> "It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior."

The basis, therefore, for the issuance of the Labor Board's order was not merely the failure on the part of the Union to obtain a majority vote before going on strike (p. 7 of Brief) but also embraced the violence and unfair labor practices on the part of the Unions, their officers and their members who were sued in a representative capacity. The Findings of the Board numbered 15 to 27

(R. 256-259), together with the amended Finding numbered 26 (R. 271), refer to the action of the Unions and indicate that the individuals who were found guilty of unfair labor practices were stationed at the hotels by the Unions as paid pickets and committed the unlawful acts on the picket line *as officers and members of the Unions.* The Board's Conclusion of Law numbered 4 (R. 260) and amended Conclusion of Law numbered 4 (R. 271, 272) specifically find the above named parties and others guilty of unfair labor practices *"arising out of the controversy between respondent unions and the complainant, Plankinton House Company."* Also, the Order of the Board to cease and desist from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House Company is expressly directed against the *appellant Unions, their officers, members, agents, successors, and assigns* (R. 260, 261). As the Wisconsin Supreme Court tersely stated in its opinion when referring to the unlawful conduct of the Unions (S. R. 70):

> "The appellants could not be ordered to cease and desist from something they were not engaged in."

Where, therefore, is there any basis in the record for the Petitioners' claim (Brief p. 40) that "the respondent unions and their members were guilty of unfair labor practices only by virtue of the employees having gone out on strike without first obtaining the approval of the majority by secret ballot and by co-operating in strike activities without such approval"?

C. The Order of the Board Enforced by the Judgment of the State Courts Is Not Too Broad and Comprehensive.

The Petitioners' claim that the Board's order is more comprehensive than necessary under the facts and "in the

instant case we have an injunction which is a complete prohibition of *all* picketing and *all* boycotting which would include in its broad meaning all other means of communication wholly unrelated to the violence involved" (Brief 51-54). The Record is directly contrary to these claims. The concerted coercive conduct enjoined by the Board's order (R. 261) was:

> "(a) Engaging in promoting and inducing picketing at or near the Plankinton House or the Kilbourn Hotel;
>
> "(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employees of the Plankinton House;
>
> "(c) Boycotting in any way the Plankinton House."

Thus, it is seen the regulation of picketing is confined to *at or near* the Plankinton House or the Kilbourn Hotel. The order does not attempt to enjoin picketing at any other place except at the vicinity in which the campaign characterized by physical violence, mass picketing and other unfair labor practices creating fear and intimidation took place. Petitioners' claim that the boycotting provision of the order prohibits communication by letter, radio, newspaper or any other physical means of publicizing the true facts concerning a labor dispute is untenable, for the term "boycott" inherently involves intimidating and coercive factors not involved in the mere exercise of the constitutional right of free speech.

It is submitted that the Board's order is not broader than the injunction issued by the Illinois Supreme Court in the *Meadowmoor case* and confirmed by this Court when it stated (312 U. S. 287 at 298):

> "The injunction is confined to conduct near stores dealing in respondent's milk and it deals with this

narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity, sanctioned by such guardians of civil liberties as Mr. Justice Cardozo. * * * Such an injunction must be read in the context of its circumstances."

As and when the continuing fear and intimidation generated by the past violence and unfair labor practices of the Petitioners has ceased, not only familiar equity procedure accords them the opportunity for modifying or vacating the order of the Board and the enforcing judgments of the State Court, but express provisions of the Wisconsin Employment Peace Act assure the Petitioners this right to relief. Thus, *Sec. 111.07 (1) Wis. Stats.* provides:

"Any controversy concerning unfair labor practices may be submitted to the Board in the manner and with the effect provided in this chapter, *but nothing herein shall prevent* the pursuit of legal or equitable relief in courts of competent jurisdiction." (Italics ours.)

The Wisconsin Courts, therefore, were always open to give the Petitioners the appropriate equitable relief as and when they were entitled to it. There was no basis upon which the State Courts could reasonably anticipate that the fear and intimidation generated by the past violence and unlawful conduct would immediately cease upon the rendition of their judgment. On the contrary, the Trial Court found (R. 20-21):

"The Board was justified in concluding that the violent methods, assaults or disturbances which were pursued or which ensued from the outset and from time to time thereafter were ample to characterize the whole campaign or to warrant a reasonable inference that the attitude of the picketers was *continuously threatening or that threatening conduct*

would be resorted to should conditions be favorable for the purpose." (Italics ours.)

This prophetic foresight of the Milwaukee Circuit Court was fully justified by the subsequent events. The Petitioners made no application to modify or vacate the order of the Board or even indicate to the State Courts that in their opinion fear and intimidation no longer existed by reason of past violence and other unfair labor practices. Taking the law into their own hands and accepting the advice of their general counsel instead of the judicial mandates of the State Court the Petitioners continued in their unlawful conduct. As a result, they were found guilty of contempt of court in a proceeding brought by the Attorney General for the State of Wisconsin to prevent their continuing manifestation of force, fear, unfair advertising and realistic picketing enmeshed with illegal boycott and picketing en masse. The Findings of Fact and Conclusions of Law in the contempt proceedings are set forth on pages 1 to 29 of the "Appendix to Reply Brief" filed by Petitioners and made part of the Record of this case. This Court's attention is particularly called to Findings of Fact XII to XXXII and Conclusions of Law number 2 to number 4 inclusive, as evidence of the continuing contumacious conduct of the Petitioners herein.

The fact that the Petitioners have made no application to the State Courts to modify or vacate the order of the Board on the ground that the continuing fear and intimidation or coercive effect of their past violence has disappeared is alone sufficient to dispose of their present contention. In the *Meadowmoor case* (312 U. S. 287 at 299) this Court stated:

> "Since the Unions did not urge that the coercive effect had disappeared either before us or apparently before the State Court, that question is not now here."

CONCLUSION

It is submitted that the judgment of the Wisconsin Supreme Court should be affirmed because the record herein shows:

(1) *Sec. 111.06 (2) (e) Wis. Stats.* as construed by the Wisconsin Supreme Court evidences a careful balancing of public and private interests and is narrowly drawn and specifically aimed at serious encroachments upon those interests so as to be a valid exercise of the State's police powers without unlawfully invading the Constitutional Rights of Free Speech and Equal Protection of the Law guaranteed by the Fourteenth Amendment.

(2) The order of the Wisconsin Employment Relations Board being coextensive with the above statute as construed by the Wisconsin Supreme Court does not result in an unconstitutional application of the statute to the undisputed evidence of past violence and continuing fear and intimidation in the case at bar.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 124.—October Term, 1941.

Hotel & Restaurant Employee's International Alliance, Local No. 122, et al., Petitioners,
vs.
Wisconsin Employment Relations Board, et al.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

[March 2, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We brought this case here from the Supreme Court of Wisconsin, 314 U. S. —, to canvass the claim that Wisconsin has forbidden the petitioners to engage in peaceful picketing insofar as we have deemed it an exercise of the right of free speech protected by the Due Process Clause of the Fourteenth Amendment. *Thornhill* v. *Alabama*, 310 U. S. 88; *American Federation of Labor* v. *Swing*, 312 U. S. 321. The specific question for decision is the constitutional validity of an order made by the Wisconsin Employment Relations Board acting under the Employment Peace Act, Wisconsin Laws of 1939, c. 57. In deciding this question we are of course controlled by the construction placed by the Supreme Court of Wisconsin upon the order and the pertinent provisions of the Act.

These are the undisputed facts. In June 1938, the petitioners, various unions representing hotel and restaurant employees, made a closed shop agreement for a year with the respondent Plankinton House Company, which owned two hotels in Milwaukee. After negotiations between the parties for renewal of the contract failed, the dispute was submitted to arbitration. On October 30, 1939, the Company notified the unions of its willingness to sign a contract in accordance with the terms of the arbitration. Three days later the employees of both hotels went on strike. Members of the unions picketed the hotels, and the company continued to operate the hotels with new employees. Union pickets forcibly prevented the delivery of goods to one of the hotels. For this conduct two union officials were arrested and fined. One of them

returned to the picket line immediately after his arrest, assaulted one of the non-striking employees, and was again arrested and fined. Numerous other outbreaks of violence resulted in the conviction of the offending pickets and occasioned special police measures to maintain the peace.

The Company complained to the Employment Relations Board that the petitioners had committed "unfair labor practices". After due hearing the Board made findings of fact, not challenged throughout these proceedings. Upon the basis of these findings the Board issued the order set forth in the margin.[1]

In accordance with the statutory provisions for judicial review, the petitioners applied to the Circuit Court of Milwaukee County, Wisconsin, to set aside the Board's order. The Board cross-petitioned for enforcement. The Circuit Court sustained the order, and an appeal was taken to the Supreme Court of Wisconsin which affirmed the judgment and, after further elucidating the meaning of the statute and the order, denied a rehearing. 236 Wis. 329, 352.

The Wisconsin statute underlying this controversy was enacted as a comprehensive code governing the relations between employers and employees in the state. Only a few of its many provisions are relevant here. Section 111.06 provides that it shall be "an

[1] "It is ordered that the respondent unions, Hotel and Restaurant Employees International Allignce, Local No. 122, International Laundry Workers, Local No. 174, Bartenders International League of America, Local No. 64, International Union of Operating Engineers, Local No. 311, and the Milwaukee Building Trades Council, the officers, members, agents, successors and assigns of each shall:

"1. Immediately cease and desist from:

(a) Engaging in promoting or inducing picketing at or near the Plankinton House or the Kilbourn Hotel;

(b) Attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company;

(c) Boycotting in any way the Plankinton House Company.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the act:

(a) Post notices to their members in conspicuous places at the union headquarters that the union has ceased and desisted in the manner aforesaid, and that all officers, members and agents of the union are to refrain from engaging in promoting or inducing picketing and boycotting of the Plankinton House Company, and also to refrain from attempting to hinder or prevent by threats, intimidation, force or coercion of any kind the pursuit of lawful work by employes of the Plankinton House Company.

(b) Notify the Board in writing forthwith that steps have been taken by each of the respondent unions to comply herewith."

unfair labor practice" to "cooperate in engaging in, promoting or inducing picketing, boycotting or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employes of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike", and to "hinder or prevent, by mass picketing, threats, intimidation, force or coercion of any kind the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free and uninterrupted use of public roads, streets, highways, railways, airports, or other ways of travel or conveyance." The Act contains a provision expressly dealing with its construction: "Except as specifically provided in this chapter, nothing therein shall be construed so as to interfere with or impede or diminish in any way the right to strike or the right of individuals to work; nor shall anything in this chapter be so construed as to invade unlawfully the right to freedom of speech." § 111.15.

The central attack against the order is that, as enforced by the Wisconsin courts, it enjoins peaceful picketing. Whether Wisconsin has denied the petitioners any rights under the federal Constitution is our ultimate responsibility. But precisely what restraints Wisconsin has imposed upon the petitioners is for the Wisconsin Supreme Court to determine. In its opinion in this case, and more particularly in its explanatory opinion denying a rehearing, the Court construed the relevant provisions of the Employment Peace Act and confined the scope of the challenged order to the limits of the construction which it gave them. That Court has of course the final say concerning the meaning of a Wisconsin law and the scope of administrative orders made under it. *Aikens* v. *Wisconsin*, 195 U. S. 194; *Senn* v. *Tile Layers Union*, 301 U. S. 468. What is before us, therefore, is not the order as an isolated, self-contained writing but the order with the gloss of the Supreme Court of Wisconsin upon it. And that Court has unambiguously rejected the construction upon which the claim of the petitioners rests.

That the order forbids only violence, and that it permits peaceful picketing by these petitioners, is made abundantly clear by the expressions of the Court:

"The act does not limit the right of an employee to speak freely. . . . The term 'picketing', as used in [the act], does not

include acts held in the *Thornhill Case*, *supra*, to be within the protection of the constitutional guaranty of the right of free speech. The express language of the act forbids such a construction. It clearly refers to that kind of picketing which the *Thornhill Case* says the state has power to deal with 'as a part of its power to preserve the peace, and protect the privacy, the lives and the property of its residents'. . . . In this case it is undisputed that numerous assaults were committed by the pickets, that the pickets acted in concert; that the fines of these pickets were paid by the unions; that ingress and egress to and from the premises of the employer were prevented by force and arms. It was at conduct of that kind that the statute was aimed. It is conduct of that kind that is dealt with in this case. It is conduct of that kind that is declared to be an unfair labor practice by the statute and from which the defendants are ordered to cease and desist. . . . ." And on rehearing: "Under the statute and the order of the board as interpreted and construed by the explicit language of the [previous] opinion, freedom of speech and the right peacefully to picket is in no way interfered with. The appellants could not be ordered to cease and desist from something they were not engaged in. . . . The picketing carried on in this case was not peaceful and the right of free speech is in no way infringed by the statute or the order of the board." 236 Wis. 329, *passim*.

What public policy Wisconsin should adopt in furthering desirable industrial relations is for it to say so long as rights guaranteed by the Constitution are respected. *Aikens* v. *Wisconsin*, 195 U. S. 194; *Senn* v. *Tile Layers Union*, 301 U. S. 468. As the order and the appropriate provisions of the statute upon which it was based leave the petitioners' freedom of speech unimpaired, the judgment below must be affirmed. Problems that would arise had the order and the pertinent provisions of the Act been otherwise construed by the Supreme Court of Wisconsin need not therefore be considered.

Affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.